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[redacted], TEAMSTERS AND HELPERS, LOCAL No. 391,
Petitioner,

v.

THOMAS C. TEET *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF OF
NATIONAL RAILWAY LABOR CONFERENCE
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1719

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL NO. 391,
Petitioner,

v.

THOMAS C. TERRY *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

The National Railway Labor Conference ("NRLC") is an unincorporated association whose members include almost all the nation's Class I railroads. Together those railroads employ more than 90% of all rail employees. The NRLC represents its member railroads both in national collective bargaining with unions pursuant to the Railway Labor Act ("RLA") and in regard to, *inter alia*, issues impacting on the statutorily-mandated grievance/

arbitration process for the resolution of all grievances arising out of railroad and airline collective bargaining agreements.[1]

This case concerns the applicability of the Seventh Amendment right to jury trial in an action, brought under the Labor Management Relations Act ("LMRA"), by a group of employees against their union alleging that the union breached its duty of fair representation ("DFR") by mishandling the employees' grievance against their employer during contractually-mandated arbitration proceedings. It must be emphasized at the outset that the instant case presents that DFR claim in a highly unusual posture. Typically this type of DFR claim is joined with a claim against the employer based on the employees' underlying grievance, resulting in a so-called "hybrid" action. In these hybrid actions, the DFR claim is used primarily as a lever to vacate the adverse arbitration award and reopen the merits of the employees' underlying grievance. See *infra* p. 6. In this case, however, the employer declared bankruptcy during the pendency of proceedings, and hence the employees' DFR claim against the union is being litigated on its own.

The nation's railroads have an acute interest in ensuring that the Court's opinion in this case does not undermine the statutorily mandated system for arbitration of employee grievances under the RLA, which applies to both the railroad and airline industries. See 45 U.S.C. §§ 153, 184. While this Court has warned against the wholesale importation of LMRA rules into the RLA, see *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383-84, 395 (1969); *Brotherhood of R.R. Trainmen v. Chicago River & I. R.R.*, 353 U.S. 30, 31 n.2 (1957), both this Court and the lower courts have sometimes looked to the NLRA and LMRA in construing

[1] Letters of consent from counsel for the parties to the filing of this brief are being lodged with the Clerk of this Court.

the Railway Labor Act, see *Jacksonville Terminal Co.*, 394 U.S. at 383; *Steele v. Louisville & N. R.R.*, 323 U.S. 192, 200-01 (1944).

In the present case there are three issues crucial to the dispute resolution process under the RLA that, while not directly raised by the question presented to this Court, could be affected by the Court's opinion. First, because the employer in this case has declared bankruptcy, the Court is not presented with deciding whether employees have a right to a jury trial on their DFR claim where that claim is part of a hybrid case that also seeks an order vacating an arbitration award and reopening the underlying grievance against the employer. Second, because this case arises under the LMRA, the Court is not presented with the question whether "hybrid" cases even properly exist under the RLA. Although rail unions are subject to a duty of fair representation, it is unresolved whether proof of a DFR breach is a basis for vacating arbitration awards under the RLA, which, unlike the LMRA, expressly lists three exclusive grounds for reopening arbitration awards—*not* including a DFR breach by the union. Finally, and again because the instant case does not arise under the RLA, the Court is not presented with the question whether, even if hybrid cases may be brought under the RLA, a court that finds that the union committed a DFR breach in handling the initial grievance/arbitration proceeding must refer the case back to arbitration for a new arbitration proceeding, rather than resolving the merits of the underlying grievance itself, given that arbitration of *all* employee grievances under the RLA is mandated *by statute*.

The NRLC accordingly urges the Court to take note that these important issues remain unresolved and, while not directly raised by this case, could be affected by the Court's opinion here. In the rest of this brief we show that, with respect to the issues directly raised herein, the court below erred in holding that the employees in this

case have a Seventh Amendment right to a jury trial. The existence of such a right turns on a two-pronged test asking (1) whether the nature of the claim is more closely analogous to claims that lay at law or in equity prior to their merger, and (2) whether the remedy sought is legal or equitable in nature. *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 2790 (1989).

First, a claim that the union committed a DFR breach by mishandling a grievance/arbitration proceeding is most closely analogous to a common law suit for breach of a fiduciary duty. *Leach v. Pan American World Airways*, 842 F.2d 285, 290 (11th Cir. 1988); *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480, 498 (1957) (Frankfurter, J., concurring). Both spring from the same equitable principles that apply where there is a special relationship of trust and confidence reposed by one person in another. *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944). Further, the standards of conduct for fiduciaries and unions are directly parallel, in that each may be found to have breached their duty if they act in a "discriminatory, dishonest, arbitrary, or perfunctory fashion," *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). Because a suit for breach of a fiduciary duty has historically been viewed as an equitable claim, *In re Evangelist*, 760 F.2d 27, 29 (1st Cir. 1985), the kind of DFR claim at issue in this case must likewise be deemed to be equitable in nature for Seventh Amendment purposes.

Second, the remedies associated with a DFR claim that the union mishandled the grievance/arbitration process are equitable in nature. In the typical situation where such a claim is brought as part of a hybrid case, the primary, and indeed indispensible, relief sought through the DFR claim is vacation of the arbitration award adverse to the employees' grievance. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). It is settled that orders vacating arbitration awards are equitable in nature. *Der-*

inger v. Columbia Transp. Div., 866 F.2d 859, 863 (6th Cir. 1989). The employees' claim for monetary damages against the union does not affect the conclusion that the remedy is equitable for Seventh Amendment purposes. Because a claim for a breach of fiduciary duty lies solely in equity, plaintiffs asserting such claims are not entitled to jury trials even if they seek monetary damages —indeed, even if they seek *only* monetary damages—as a remedy for the alleged fiduciary breach. *Krinsk v. Fund Asset Mgmt., Inc.*, 875 F.2d 404, 414 (2d Cir. 1989). The same rule applies to the kind of DFR claim at issue in this case—both where it arises in the normal hybrid case context and where, as here, it is brought on its own—since the DFR action, by analogy to the fiduciary duty action, lies solely in equity. Likewise, it is settled that where monetary damages may be awarded solely as an incident to equitable relief, the damages are considered equitable for Seventh Amendment purposes. *Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975). That too applies to this kind of a DFR action in the typical hybrid case setting, since any award of damages from the union on the DFR claim is necessarily incidental to the more fundamental, and predicate, order vacating the initial arbitration award. Accordingly, the remedies for the kind of DFR breach at issue here, both in a hybrid case seeking an order vacating arbitration in addition to monetary damages and in an atypical case seeking monetary damages alone, must be deemed equitable for Seventh Amendment purposes.

ARGUMENT

I. INTRODUCTION

Under this Court's precedent, the applicability of the Seventh Amendment to a statutory cause of action, such as a claim that a union has breached its duty of fair representation, turns on a two-pronged analysis. First, the Court must "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity" to determine whether the present action is more closely analogous to actions that historically could only have been brought at law or to those that lay in equity. *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 2790 (1989); *Tull v. United States*, 481 U.S. 412, 417-18 (1987). Second, the Court must examine "the remedy sought and determine whether it is legal or equitable in nature." *Tull*, 481 U.S. at 418. As this Court has recently said, the nature of the remedy is generally the "more important" of these factors. *Nordberg*, 109 S. Ct. at 2790.

In applying these principles to the kind of DFR claim at issue here—alleging that the union mishandled a grievance/arbitration procedure—it is essential to recognize that the instant case arrives in this Court in a most unusual posture. Typically such a DFR claim will be joined in a so-called "hybrid" lawsuit with a claim against the employer to reopen the merits of the employees' underlying collective bargaining agreement grievance. See, *e.g.*, *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Bowen v. United States Postal Service*, 459 U.S. 212 (1983); *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981). Although the complaint in this case included such a claim, the employer declared bankruptcy during the pendency of district court proceedings. See 863 F.2d at 335 n.1. Accordingly, because the claim against the employer was stayed and the employees proceeded on their DFR claim

against the union alone, this case presents this Court with the DFR claim removed from its ordinary context.

We show in this brief that the right to jury trial does not apply to the kind of DFR claim at issue in this case regardless of whether it is the sole claim in the case—as it is here—or is instead part of a hybrid case—as is normally the case. However, because the analysis is somewhat different—and indeed even clearer—in the case where the DFR claim is part of a hybrid action, we discuss both situations separately below.

II. BACKGROUND LEGAL PRINCIPLES

A. The Exclusivity and Finality of Arbitration

Employees who believe that they have been injured by their employer's alleged violation of a collective bargaining agreement generally *cannot* bring their claim against the employer in federal court. Although § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, provides a cause of action in federal court for breaches of collective bargaining agreements arising under that Act, almost all collective bargaining agreements contain mandatory grievance/arbitration clauses that make union-initiated arbitration the sole remedy for such breaches and thus prevent the employees from suing the employer directly in federal court. See, *e.g.*, *United Paperworkers Int'l Union v. Misco, Inc.*, 108 S. Ct. 364, 370 (1987); *Republic Steel Corp. v. Maddox*, 370 U.S. 650 (1965). The exclusivity of arbitration is even more pronounced under the RLA, which *statutorily mandates* arbitration of *all* grievances arising out of railroad and airline collective bargaining agreements. See 45 U.S.C. §§ 153 First (i), 184; *Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 322 (1972). In general, once an arbitrator has resolved the employees' grievance or has held that the time limits for bringing the grievance have expired, the results are "[s]ubject to [only] very limited judicial review" and the employees are "bound by the

result." *DelCostello*, 462 U.S. at 164; see also *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978).

B. The Hybrid Case Exception to the Finality of Arbitration Awards

1. *The LMRA.* This Court has implied a limited exception to the finality of the arbitration process *under the LMRA* in cases where the employees prove that "the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation." *DelCostello*, 462 U.S. at 164; see *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567, 572 (1976); *Vaca v. Sipes*, 386 U.S. 171, 185 (1967). In cases where the union has "wrongful[ly]" refused to pursue a claim to arbitration, the court may, *inter alia*, compel the union to arbitrate the claim. *Vaca*, 386 U.S. at 185. In cases where a prior arbitration award has been "tainted" by the union's breach, and where the employer is joined as a defendant, the courts must "remove" any "bar" to reopening the merits of the employees' underlying grievance against their employer. *Hines*, 424 U.S. at 567.

In this regard, this Court has also recognized that, *under the LMRA*, the DFR claim against the union may be joined together, in a single action, with a claim against the employer based on the underlying labor grievance, creating a so-called hybrid case. *Hines*, 424 U.S. 554; *DelCostello*, 462 U.S. 151. However, because the results of the arbitration process are final and binding on the employee unless and until they are set aside by the court in order to remedy the union's DFR breach, the employee must "show that the [u]nion's duty to represent him fairly at the arbitration ha[s] been breached *before he [is] entitled to reach the merits of his contract claim.*"

Mitchell, 451 U.S. at 62 (emphasis added); see, *e.g.*, *Adams v. Budd Co.*, 846 F.2d 428, 434 (7th Cir. 1988).

2. *The RLA.* Although rail unions are also subject to DFR claims for mishandling grievances under the RLA, see *Czosek v. O'Mara*, 397 U.S. 25 (1970), the Court has *not* addressed the issue of whether proof of such a breach provides a basis for undoing the binding nature of arbitration awards *under the RLA*. Unlike the LMRA, which provides no express limitations on the scope of judicial review of arbitration awards, the RLA expressly states that arbitration orders may be set aside or remanded only in *three* specific situations: (1) where the arbitration board failed "to comply with the requirements of [the Act]"; (2) where the arbitration board failed "to conform, or confine itself, to matters within the scope of the division's jurisdiction"; or (3) where a member of the arbitration board is guilty of "fraud" or "corruption." See 45 U.S.C. § 153 First (q). This Court has "time and again emphasized that this statutory language means just what it says" and that railroad arbitration awards "may be set aside *only for the three reasons specified*" in the statute. *Sheehan*, 439 U.S. at 93 (emphasis added).[2] Accordingly, because a DFR breach is not one of the three enumerated grounds for vacating an RLA arbitration award, we believe that the DFR exception to the finality of arbitration awards implied under the LMRA in *Vaca* and *Hines* is *not* applicable under the RLA. See *Crusos v. United Transp. Union*, 786 F.2d 970, 972 (9th Cir. 1986) (Kennedy, J.); *United Steelworkers of America v. Union R.R.*, 648 F.2d 905, 913 (3d Cir. 1981). However, because several lower courts have (without addressing this analysis) im-

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[2] Moreover, as this Court has noted, because the RLA gives employees a statutory right to process their grievance themselves, without union participation, 45 U.S.C. § 153 First (j), rail and airline unions cannot "prevent" arbitration from taking place, unlike unions with the sole power to process grievances under the LMRA. *Bowen*, 459 U.S. at 229.

ported such an exception from the LMRA context[3] and this Court has not resolved the issue as yet, the existence of such an exception under the RLA remains unresolved at this time. And since vacation of the arbitration award is a necessary predicate to relitigating the grievance against the employer, it is similarly unsettled whether "hybrid" cases of the kind recognized under the LMRA may properly be brought under the RLA.

C. Handling the Underlying Grievance in Hybrid Cases

1. *The LMRA.* As this Court has recognized, the threshold determination in a hybrid case as to whether the union has breached its duty of fair representation during the grievance/arbitration process does *not* involve resolution of the merits of the employees' underlying grievance. In *Mitchell* this Court expressly distinguished between "a demonstration that the [u]nion breached its duty of fair representation" and "a showing under traditional contract law that the [employer's action] was a breach of the collective-bargaining agreement." 451 U.S. at 62. Specifically, in order to prevail on their DFR claim, the employees need only show that the union's conduct was "arbitrary, discriminatory, or in bad faith" and either "tainted" the arbitration or "prevented" arbitration from taking place. *Vaca*, 386 U.S. at 185, 190 (citations omitted); *Hines*, 424 U.S. at 571, 572. While resolution of this issue may require determination that the employee "had a plausible claim on the merits, perhaps even a fairly strong claim," it does *not* require a decision that the employee "had a claim that he was *bound to win.*" *Stanton v. Delta Air Lines*, 669 F.2d 833, 838-39 & n. 7 (1st Cir. 1982) (Breyer, J.) (emphasis in original); accord *Wood v. International Brotherhood of Teamsters*, 807 F.2d 493, 500 (6th Cir. 1986).

[3] *E.g., Barnett v. United Air Lines*, 738 F.2d 358, 362 (10th Cir. 1984); *Childs v. Pennsylvania Fed'n BMWE*, 831 F.2d 429, 439 (3d Cir. 1987).

The question thus arises as to whether, once a DFR breach has been found and the initial arbitration award has been vacated, the underlying grievance against the employer is to be resolved in court or by referral back to arbitration. Although this Court has never squarely addressed that issue,[4] the lower courts have generally either assumed or held that the grievance should be resolved in court.[5] We believe that the courts' assumption of jurisdiction in such circumstances to resolve these otherwise-arbitrable disputes arising out of collective bargaining agreements under the LMRA is erroneous and runs contrary to recent precedent from this Court. In particular, this Court has reaffirmed its strong support for resolving disputes in arbitration wherever possible,[6] particularly in the labor context,[7] and has expressly held

[4] In *Vaca*, the Court expressly indicated that referral to arbitration is "one of the available remedies when a breach of the union's duty is proved." 386 U.S. at 196. In *Hines*, the Court held that a tainted arbitration award should be vacated, but did not decide whether the grievance should be relitigated in court or referred back to arbitration.

[5] *E.g., Kissinger v. United States Postal Service*, 801 F.2d 551 (1st Cir. 1986); *Wyatt v. Interstate & Ocean Transp. Co.*, 623 F.2d 888 (4th Cir. 1980). In *Varra v. Dillon Companies, Inc.*, 615 F.2d 1315, 1317-18 (10th Cir. 1980), and *Santos v. American Broadcasting Co.*, 866 F.2d 892 (6th Cir. 1989), though, the courts properly recognized a presumption in favor of arbitration.

[6] See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989) (claims under Securities Act of 1933); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (claims under Securities Exchange Act of 1934 and RICO); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (claims under antitrust laws). Just last term, this Court reaffirmed the need to "discourage litigants" from trying to bring arbitrable disputes into court by "manipulating their allegations," and accordingly overruled a 1953 precedent that allowed certain securities claims to be brought in court instead of arbitration. *Rodriguez de Quijas*, 109 S. Ct. at 1922.

[7] See, *e.g., Misco*, 108 S. Ct. 364; *AT&T Technologies, Inc. v. CWA*, 475 U.S. 643 (1986).

that the federal policies favoring arbitration are sufficiently strong to justify bifurcating federal court actions in order to refer arbitrable claims to arbitration.[8] Of course, the strong policies in favor of arbitration of labor grievances, including particularly the need for expertise in the interpretation of collective bargaining agreements, are equally applicable where the union's DFR breach requires that the merits of an employee's grievance be resolved a second time.[9]

In sum, this Court has held that, under the LMRA, employees should not suffer, and employers should not profit, as a result of a union's DFR breach. *Vaca*, 386 U.S. at 195-96; *Hines*, 424 U.S. at 569-70. But requiring that the employees rearbitrate their grievance against the employer (before a new arbitrator and with representation of their own choosing) would simply put them back in the position that they were in prior to any misconduct by the union. Accordingly, rearbitration would afford them a full and fair remedy for the union's DFR breach without depriving the blameless employer of its right to arbitration and without undermining the strong federal interests in favor of the arbitration of labor disputes by experts familiar with the law of the shop.

2. *The RLA.* Under the RLA, as noted at pp. 9-10 above, it is unsettled whether proof of a DFR breach

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[8] *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218-21 (1985) (involving the Federal Arbitration Act, whose pro-arbitration policies are comparable to those in the labor law context).

[9] As this Court has recognized, those policies include (1) securing the "prompt," "inexpensive," and "final" settlement of grievances, *Nolde Bros., Inc. v. Local No. 358*, 430 U.S. 243, 254 (1977); see also *Bowen v. United States Postal Service*, 459 U.S. 212, 226 (1983); (2) providing the expertise necessary to properly interpret collective bargaining agreements, *Nolde Bros., Inc.*, 430 U.S. at 253-54; *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); and (3) ensuring uniformity of dispute resolution, *Bowen*, 459 U.S. at 226.

justifies vacating an arbitration award, and hence whether hybrid actions seeking to reopen arbitration awards may properly be brought at all. Even assuming *arguendo* that such actions can be filed, we think it clear that, if a DFR breach is proved, the only proper course in an RLA case would be to refer the underlying grievance back to arbitration for an untainted determination by a new arbitrator. Unlike § 301 of the LMRA, which generally provides a federal court forum for the resolution of employee grievances absent a contractual arbitration clause, § 3 of the RLA *statutorily mandates* that all railroad and airline grievances be resolved exclusively *in arbitration.* 45 U.S.C. § 153; see p. 7 *supra.* This Court has repeatedly held that that provision must be strictly enforced,[10] in order to fulfill the strongly pro-arbitration goals of the RLA.[11] For these reasons, several courts have properly held that, where a DFR breach is shown in an RLA case, "the burden . . . rests on those opposed to arbitration as a remedy to demonstrate why it is unsuitable." *Stanton*, 669 F.2d at 836-37; accord *Curtis v. United Transp. Union*, 486 F. Supp. 966, 972, 979 (E.D. Ark. 1979), *rev'd on other grounds*, 648 F.2d 492 (8th Cir. 1981).[12]

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[10] See *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2484 (1989); *Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978); *Andrews v. Louisville & N. R.R.*, 406 U.S. 320 (1972).

[11] Requiring arbitration of RLA grievances is essential to secure that Act's goals of (1) the "prompt and orderly" settlement of disputes, 45 U.S.C. § 151a(5); *Sheehan*, 439 U.S. at 94; (2) the use of arbitrators possessing the "specialized technical knowledge" needed to interpret railway labor contracts, *Pennsylvania R.R. v. Day*, 360 U.S. 548, 553 (1959); *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, 243 (1950); and (3) the assurance of uniformity of contract interpretation, *Day*, 360 U.S. at 553.

[12] *But see, e.g., Kaschak v. Consolidated Rail Corp.*, 707 F.2d 902 (6th Cir. 1983); *Middleton v. CSX Corp.*, 694 F. Supp. 941, 947 (N.D. Ga. 1988).

D. Damages Against the Union

If, following a finding that the union breached its duty of fair representation, it is determined (either in court or back in arbitration) that the employees' underlying grievance is valid,[13] the employees may be entitled to recover, in court,[14] additional relief from the union for the "increase, if any, in . . . damages" caused by the union's conduct. *Vaca*, 386 U.S. at 195-98 (LMRA); see *Bowen*, 459 U.S. at 223 (LMRA); *Czosek*, 397 U.S. at 29 (RLA). In this way, the employees can be fully returned to the position they would have occupied if the union had not breached its duty.[15]

E. Atypical Cases Where the Employees Bring the DFR Claim Alone, Rather than as Part of a Hybrid Case

In rare situations, such as the situation in the present case, employees may be forced (or may choose) to pursue a DFR claim arising out of their union's alleged mishandling of a grievance/arbitration proceeding as their only claim, rather than as part of a hybrid case against both their union and employer. In the present case, for example, the employer has gone into bankruptcy; similar situations could arise where the employer has been liquidated or has reached a separate settlement with the employees. This Court has recognized that, in such

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[13] It is settled that the employees cannot recover damages from the union without proving that their underlying grievance was valid. *DelCostello*, 462 U.S. at 165.

[14] If the underlying grievance is referred to arbitration, the arbitrator generally will not have power to award relief against the union. See, *e.g.*, *Vaca*, 386 U.S. at 196; *Czosek*, 397 U.S. at 27-28.

[15] Where the employees allege and prove that the union "affirmatively caused" the employer to commit the alleged breach of the labor contract. the union also may be held jointly and severally liable for any damages found owing to the employees because of the employer's breach. *Vaca*, 386 U.S. at 197 n.18.

circumstances, the employees still have the right to proceed with their claim against the union for its alleged DFR breach, although as just shown the damages recoverable from the union generally cannot include the injury directly attributable to the underlying contract breach.

As noted above, once a DFR breach is proved, the employees must show that their underlying grievance was valid in order to show that the union's DFR breach led to injury entitling them to monetary damages from the union. In these atypical non-hybrid cases where the employer is absent, it may well be impossible for the underlying grievance to be referred to arbitration. Under such circumstances, and solely for purposes of disposing of the DFR claim against the union, the court must itself determine whether the employees' underlying grievance was in fact valid. Of course, because the employer is absent, that determination is not binding on the employer, and its resolution in court therefore does not contravene the policy considerations, discussed at pp. 11-12 *supra*, that support arbitration whenever possible.

III. THERE IS NO SEVENTH AMENDMENT RIGHT TO A JURY TRIAL WITH RESPECT TO THE KIND OF DFR CLAIM AT ISSUE IN THIS CASE BECAUSE IT IS EQUITABLE IN NATURE AND INVOLVES EQUITABLE REMEDIES

We show in this Part that the kind of DFR claim at issue in this case—alleging the mishandling of grievance/arbitration proceedings—carries no Seventh Amendment right to a trial by jury, because the claim is equitable in nature and involves equitable remedies.

A. The DFR Claim at Issue Is Most Analogous to a Pre-Merger Action for Breach of Fiduciary Duty, Which Was Equitable in Nature

As noted above, the first prong of the Seventh Amendment test requires an examination of whether the cause of action is legal or equitable in nature. The duty of fair

representation owed by a union to its members was implied by this Court from the federal labor statutes, see *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944); *Vaca v. Sipes*, 386 U.S. at 177, and has no precise 18th century counterpart at either common law or equity, see *Leach v. Pan American World Airways*, 842 F.2d 285, 290 (11th Cir. 1988). However, as we now show, the union's duty is derived from the same equitable principles that gave rise to actions for breach of fiduciary duties in 18th century courts of equity, and the standards of conduct applied to the union are identical to those applicable in fiduciary relationships.

1. *Source of the duty.* The common law recognizes the existence of a fiduciary duty where "special confidence [is] reposed" in a party that "is bound to act in good faith and with due regard to the interests of [the person] reposing [the] confidence." [16] The same underlying equitable principles led to recognition of a union's duty of fair representation. As this Court expressly said, the duty is derived from the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf . . . ." *Steele*, 323 U.S. at 202. As the flip side of the confidence employees repose in their unions, there is a need to protect employees who have been "stripped of traditional forms of redress." *Vaca*, 386 U.S. at 182; *Hines*, 424 U.S. at 564. Thus both common law fiduciary duties and a union's duty of fair representation arise from the same kind of relationship and the same equitable principles.

2. *Standards of conduct.* A union's duty of fair representation is "equal in scope to its authority," and requires it to act with "complete good faith and honesty of purpose in the exercise of its discretion." *Hines*, 424 U.S. at 564. As noted above, this Court has held that the duty may be violated, in a case of this kind, where the union acts in a particularly "discriminatory, dishonest, arbitrary, or perfunctory fashion." *DelCostello*, 462 U.S. at 164. The same standards of review apply to claims for breach of a fiduciary duty. As is well established, fiduciaries must not act in an arbitrary,[17] dishonest,[18] discriminatory,[19] or perfunctory [20] manner, but instead must exercise the "utmost good faith." [21] Thus the standards of conduct for a union are the same as those applicable to a fiduciary at common law.

3. *The DFR claim is therefore equitable in nature.* In short, the DFR claim at issue here most closely resembles a common law claim for breach of fiduciary duty. See *Leach*, 842 F.2d at 290; *NLRB v. Local 282, IBT*, 740 F.2d 141, 147 (2d Cir. 1984); *King v. Fox Grocery Co.*, 678 F. Supp. 1174, 1176 (W.D. Pa. 1988); accord *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480, 498 (1957) (Frankfurter, J., concurring) (union representatives handling grievance/arbitration procedures "are in what amounts to a fiduciary position").[22]

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[16] *Hunt v. Hunt*, 718 P.2d 560, 576 (Idaho 1986); *Brisson v. Williams*, 345 S.E.2d 432, 435 (N.C. App. 1986); *Brown v. Foulks*, 657 P.2d 501, 506 (Kan. 1983); *Long v. Towne*, 639 P.2d 528, 530 (Nev. 1982); *H-B Ltd. Partnership v. Wimmer*, 257 S.E.2d 770, 773 (Va. 1979); *Herbolsheimer v. Herbolsheimer*, 328 N.E.2d 529, 530 (Ill. 1975).

[17] *Nobile v. Pension Comm.*, 611 F. Supp. 725, 729 (S.D.N.Y. 1985); *Pastan v. Pastan*, 390 N.E.2d 253, 256 (Mass. 1979); *Galler v. Galler*, 238 N.E.2d 274, 277 (Ill. App. 1968).

[18] Uniform Fiduciaries Act (U.L.A.) § 1(2); *Hoffman v. First Virginia Bank*, 263 S.E.2d 402, 408 (Va. 1980).

[19] *Short v. United States*, 719 F.2d 1133, 1137 (Fed. Cir. 1983).

[20] *Burnett v. First National Bank of Waco*, 567 S.W.2d 873, 876 (Tex. Civ. App. 1978).

[21] *Black v. Dahl*, 625 P.2d 876, 880-81 (Alaska 1981), quoting *Mersky v. Multiple Listing Bureau*, 437 P.2d 897, 899 (Wash. 1968).

[22] In *DelCostello*, this Court suggested that a DFR claim might be considered most analogous to a claim for legal malpractice. 462 U.S. at 167. But evidently breach of fiduciary duty was not

Historically, cases seeking to redress a breach of fiduciary duty could be brought only in courts of equity and were not subject to trial by jury. See *In re Evangelist*, 760 F.2d 27, 29 (1st Cir. 1985); *Nobile v. Pension Committee*, 611 F. Supp. 725, 729 (SD.N.Y. 1985) (claim for "arbitrary and capricious" conduct restates "traditional standard of judicial review of fiduciaries' determinations" which has "traditionally been done by judges rather than juries"); *Kaitz v. District Court*, 650 P.2d 553, 555 (Colo. 1982); *In re Estate of Coyle*, 308 N.Y.S.2d 899, 902 (App. Div. 1970); *cf. Seminole Nation v. United States*, 316 U.S. 286, 298 (1942); *Trustees v. Journeymen Plasterers' Protective and Benevolent Society*, 794 F.2d 1217, 1220 (7th Cir. 1986). Because the DFR claim at issue in this case is most closely analogous to premerger actions for breach of fiduciary duty, therefore, the DFR claim must be classified as equitable for Seventh Amendment purposes.

4. *Atypical cases where the underlying grievance is litigated in court as part of the DFR claim.* As noted above, in unusual cases, like the present one, a DFR claim may be brought alone and the court may be required to adjudicate the employees' underlying grievance against their employer in the course of resolving the employees' entitlement to damages against the union on the DFR

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presented to the Court as a possible analogy in the *DelCostello* case, and in fact such an analogy is demonstrably more apt than is an analogy to malpractice. Most fundamentally, legal malpractice turns on whether the attorney was *negligent*, while a DFR claim, like a claim against an attorney for breach of fiduciary duty, turns on whether the union failed to act "in good faith and honesty of purpose in the exercise of its discretion." *Hines*, 424 U.S. at 564. See R. Mallen & J. Smith, *Legal Malpractice* § 11.1, p. 633 (3d ed. 1989) (noting that an attorney's fiduciary obligations involve a standard of conduct, while malpractice actions involve a standard of care, i.e., of skill and knowledge); *Bukoskey v. Shuham*, 666 F. Supp. 181, 184 (D. Alaska 1987) (same); *Newman v. Silver*, 553 F. Supp. 485, 495 (S.D.N.Y. 1982) (same), *aff'd in relevant part*, 713 F.2d 14 (2d Cir. 1983).

claim. See pp. 14-15 *supra*. But the fact that the court may have to decide whether the collective bargaining agreement was violated in order to determine the employees' entitlement to damages against the union does not make such a case primarily legal in nature. In such a case, the cause of action is still based solely on the alleged DFR breach, and the merits of the underlying grievance are addressed only as a *subsidiary* step in determining whether that breach caused the employees any injury entitling them to damages. Accordingly, even in the rare case, like the present one, where the DFR claim also incidentally involves resolution of the underlying grievance, breach of fiduciary duty must *still* be viewed as the most apt analogy for the employees' claim, and hence the claim still must be deemed equitable in nature.

B. The Remedies Involved in this Type of Fair Representation Claim Are Equitable Remedies

As noted above, the nature of the remedy sought is deemed the "more important" factor in determining whether a party is entitled to a jury trial. *Nordberg*, 109 S. Ct. at 2790. As we show in this section, the relief sought in connection with the kind of DFR claim at issue here is equitable, both in the typical hybrid case and even in cases, like this one, seeking only monetary relief against the union.

1. *Relief in the typical hybrid case.* As discussed in detail above, the principal relief sought by employees in connection with a DFR claim in a typical hybrid case is the vacation of the grievance/arbitration result adverse to the employees' grievance against the employer. See pp. 6, 8 *supra*. Only *after* such relief has been granted, and even then only *after* the employees have prevailed at the subsequent proceeding involving the merits of their underlying grievance,[23] can the employees seek monetary

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[23] As noted above, in all cases under the RLA and, we submit, in virtually all cases under the LMRA, a court finding a DFR breach

damages against the union for the DFR breach. See pp. 8-9, 14 *supra*.

It is well settled that orders vacating arbitration awards are equitable and carry no right to a jury trial. See, *e.g.*, *Deringer v. Columbia Transp. Div.*, 866 F.2d 859, 863 (6th Cir. 1989); *Leach v. Pan American World Airways*, 842 F.2d 285, 288 (11th Cir. 1988).[24] It is thus apparent that the primary—and essential—relief sought in a DFR claim in a hybrid case is equitable in nature. Courts focusing solely on the request for monetary damages from the employer and/or the union have simply overlooked the fact that vacation of the existing arbitration award is a necessary equitable predicate to moving on to the merits of the underlying grievance against the employer, as well as to any subsequent damages claim against the union.[25]

The fact that, in a typical hybrid case, the employees generally *also* seek monetary relief against the union in connection with their DFR claim does not mean that the remedies for that claim should be characterized as "legal" for Seventh Amendment purposes. This Court has recognized that monetary awards are not necessarily "legal" in nature. *Curtis v. Loether*, 415 U.S. 189, 196 (1974);

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in the handling of the initial grievance/arbitration proceeding must enter an equitable order compelling arbitration. See pp. 10-13 *supra*.

[24] Likewise, an order compelling arbitration is an equitable form of relief. *DelCostello*, 462 U.S. at 168 n.17.

[25] *E.g.*, *Cox v. C.H. Masland & Sons, Inc.*, 607 F.2d 138, 143 (5th Cir. 1979); *Cook v. National Maritime Union*, 617 F. Supp. 1052, 1053 (S.D.N.Y. 1985). Of course, some other cases finding a jury trial right in DFR claims involve DFR claims outside the context of the union's handling of a grievance/arbitration process and hence are inapplicable here. See, *e.g.*, *Quinn v. DiGiulian*, 739 F.2d 637, 638 (D.C. Cir. 1984) (claim that union engaged in "relentless campaign of harassment" against plaintiff due to his decision to run against incumbent officer).

accord Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975); *Cox v. Kansas City*, 76 F.R.D. 459, 459 (W.D. Mo. 1977). As shown at pp. 16-18 above, a claim for breach of fiduciary duty is an equitable claim, and courts have consistently held that plaintiffs asserting such claims are not entitled to jury trials even where they seek monetary damages as a remedy for the alleged fiduciary breach. See, *e.g.*, *Krinsk v. Fund Asset Mgmt., Inc.*, 875 F.2d 404, 414 (2d Cir. 1989) (seeking solely money damages); *Kaitz v. District Court*, 650 P.2d 553, 555 (Colo. 1982) (same); *Horizon House-Microwave, Inc. v. Bazzy*, 486 N.E.2d 70, 77 (Mass. App. 1985) (seeking money damages in addition to equitable relief).[26] It follows that, because a court's jurisdiction in a DFR suit is also equitable, see pp. 16-18 *supra*, any monetary damages that may be awarded in the course of such an action are necessarily equitable, and the claim for such damages does not entitle the plaintiffs to a jury trial.

By the same token, it is well settled that where monetary damages may be awarded only as an incident to primarily equitable relief, the monetary damages themselves are considered equitable and do not entitle the plaintiff to a jury trial under the Seventh Amendment. *Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975) (no jury trial where monetary relief is an "integral part of the equitable remedy"); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969) (cited with approval in *Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 375 (1979)); *King v. Fox Grocery Co.*, 678 F. Supp. 1174, 1177 (W.D. Pa. 1988) (monetary relief equitable where it "flows from" equita-

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[26] Put otherwise, because the claim for a breach of fiduciary duty raises a "traditionally equitable question" and because no monetary relief can be awarded "[u]nless and until that equitable question is resolved in [the plaintiffs'] favor," there is no right to a jury trial with respect to the claim for such monetary relief. *Nobile v. Pension Committee*, 611 F. Supp. 725, 729 (S.D.N.Y. 1985).

ble remedy vacating arbitration order); *Chrysler Workers Ass'n v. Chrysler Corp.*, 663 F. Supp. 1134, 1142 (N.D. Ohio 1986) (claim for monetary damages for DFR merely an incident to equitable relief); *Towers v. Titus*, 5 Bankr. 786, 795 (N.D. Cal. 1979). This principle is likewise applicable here, since any claim for damages against the union based on the DFR claim in a hybrid case is incidental to the primary relief of vacating the arbitration award, see pp. 19-20 *supra*, again leading to the conclusion that the claim for damages is itself equitable and provides no basis for a jury trial.[27]

In sum, when a DFR claim is brought in a hybrid case, both the primary relief sought through that claim—vacation of the arbitration award—and any incidental claim for damages against the union are equitable.[28]

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[27] The fact that equitable relief is a necessary predicate to the claim for money damages distinguishes the situation addressed in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959), and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473 (1962), which involved independent equitable and legal claims brought together in the same action. In *Ross v. Bernhard*, 396 U.S. 531 (1970), although equitable relief was a predicate to a claim for monetary relief, the latter claim arose out of a wholly separate cause of action.

[28] Moreover, even if it were found that the claim for monetary relief against the union is legal in nature, that would *not* entitle the employees to a jury trial on the merits of their DFR claim that the union mishandled the grievance/arbitration process and that the arbitration award should be vacated. This Court has recognized that "imperative circumstances" may justify prior determination of equitable claims that would otherwise be subject to the right to jury trial. *Beacon Theatres*, 359 U.S. at 510-11; *Dairy Queen*, 369 U.S. at 473; see also *Leach*, 842 F.2d at 289 & n.7. We submit that the federal policies involved in deciding whether to set aside a final arbitration award on the basis of a union's alleged DFR breach present such imperative circumstances.

Permitting juries to decide whether an arbitration award should be set aside would severely undermine the grievance machinery which this Court has recognized is "at the very heart of the system of industrial self-government." *United Steelworkers of America*

2. *Relief in a non-hybrid case not involving the employer.* As we have just shown, a court's jurisdiction over a fiduciary-type DFR claim lies in equity, and hence any monetary relief granted in such an action is deemed to be equitable. Indeed, that is true even where the only relief sought in such a case is money damages. *See, e.g., Krinsk v. Fund Asset Mgmt., Inc.*, 875 F.2d 404, 414 (2d Cir. 1989); *Kaitz v. District Court*, 650 P.2d 553, 555 (Colo. 1982). It therefore follows that, even in the atypical non-hybrid case where the employees do not sue the employer and hence are not seeking to vacate the adverse arbitration award, but instead are only seeking money damages against the union, they still are not seeking legal remedies and they still have no right to a jury trial.

C. Conclusion

In sum, the present DFR claim most closely resembles an equitable claim for breach of a fiduciary duty. The primary relief generally sought through such claims, va-

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v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581 (1960) Under the LMRA, the RLA, and the Federal Arbitration Act, the task of reviewing arbitration awards has been assigned *exclusively* to judges. *Misco*, 108 S. Ct. 364 (LMRA); *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (LMRA); 45 U.S.C. § 153 First (q) (RLA); 9 U.S.C. § 10(c) (Fed. Arb. Act). Creating a special exception to this rule in DFR cases would issue an open invitation to dissatisfied employees to challenge any adverse result merely by "tacking on a [fair representation] claim against their union in a federal court suit against their employer." *Bautista*, 828 F.2d at 552. Any increase in such challenges would greatly disrupt the "orderly" settlement of disputes, which the Court has recognized is "essential to the national labor policy," *Bowen*, 452 U.S. at 226, and could well "affect[] the entire relationship between company and union," *Mitchell*, 451 U.S. at 64 (citations omitted). Increased uncertainty would discourage labor and management from entering into arbitration agreements in the first place, would heighten the conflict and tension associated with labor disputes, and could ultimately threaten the peaceful labor-management relations that the national labor laws were intended to foster. See pp. 11-12 *supra*.

cation of an arbitration award, is equitable. Any monetary relief awarded in connection with such a claim is similarly equitable, whether or not it is incidental to a claim for equitable relief. In result, both prongs of the Seventh Amendment test show that the DFR claim at issue here is equitable. Plaintiffs are therefore not entitled to a jury trial on that claim.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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